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No. 94-832

In The

Supreme Court of the United States

October Term, 1994

JOSEPH F. WIERBICKI,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED

Should this Court review a per curiam decision of the United States Court of Appeals for the Eleventh Circuit which, after careful consideration and analysis of the factual record, briefs of the parties and applicable authorities, affirmed the District Court's grant of summary judgment to Respondent on Petitioner's breach of contract and related claims?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Norfolk Southern Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of

the United States Court of Appeals for the Eleventh Circuit.[1]

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit is not published but the affirmance is reported at 22 F.3d 1099 (11th Cir. 1994). The opinion is reproduced at Appendix A-10 through A-11 of the Petition. The opinion of the United States District Court for the Northern District of Georgia is not reported. That opinion is reproduced at Appendix A-1 through A-7 of the Petition.

JURISDICTION

The basis for invoking this Court's jurisdiction is 28 U.S.C. § 1254(1). The Eleventh Circuit opinion was issued on May 5, 1994, and a petition for rehearing on that

[1] In accordance with the provisions of Sup. Ct. R. 29.1, the following is a listing of the parent companies and subsidiaries of Norfolk Southern Corporation: Norfolk Southern Railway Company (formerly Southern Railway Company); Norfolk & Western Railway Company; High Point, Randelman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; Norfolk and Portsmouth Belt Line Railroad Company; The North Carolina Midland Railroad Company; The North Carolina Railroad Company; Richmond-Washington Company; The South Western Railroad Company; State University Railroad Company; Yadkin Railroad Company.

decision was denied on September 19, 1994. (Petition, Appendix A-14, A-15).

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions involved in this case.

STATEMENT OF THE CASE

Petitioner's Statement of the Case improperly attempts to embellish the record in this action in an effort to create the impression that this case involves an employment discrimination claim. Petitioner seeks to obscure the fact that he is simply a disappointed job applicant who undisputedly failed to satisfy the conditions of Respondent's contingent job offer (and was consequently never hired by Respondent) and that there is no basis for any statutory age or race discrimination claim in this record. Petitioner brought this action claiming breach of an "employment contract" and seeking the recovery of "reliance" damages. At no time during the pendency of this litigation did Petitioner raise or even suggest any employment discrimination claims involving age or race. No evidence relating to any such claims was presented in the District Court and there is nothing in the record to support the assertions and accusations which have now been advanced by Petitioner in his argument as the basis for such allegations.

REASONS FOR DENYING THE WRIT

No special or important reasons exist for granting a writ of certiorari in this case. Petitioner does not (and cannot) contend that the decision of the Eleventh Circuit is in conflict with the decision of any other federal court of appeals on the same matter nor can Petitioner successfully assert that the Eleventh Circuit has decided a federal question in a way which is in conflict with a state court of last resort. Sup. Ct. R. 10.1(a). The Eleventh Circuit has not "decided an important question of federal law which has not been, but should be, settled by this Court," nor has the Eleventh Circuit "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). The decisions cited by Petitioner – *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) – are in no way implicated by the decision of the Eleventh Circuit in this case.

Petitioner also cannot claim here that the Eleventh Circuit has so far departed from the accepted course of judicial proceedings, or sanctioned such a departure by a lower court, so as to call for supervisory intervention by this Court. Far from ignoring "evidence" as Petitioner claims, the Eleventh Circuit panel carefully considered Plaintiff's arguments against the record in this case and properly concluded that Petitioner's appeal from the grant of summary judgment by the District Court had no merit. The Petition here does no more than recite the familiar litany of a dissatisfied litigant who is unable to accept the fact that both the District Court and the Court of Appeals, having reviewed a complete factual record

developed upon full discovery and having given due and deliberate consideration to all of Petitioner's arguments, disagreed with Petitioner's claims and ruled against him. The fact that Petitioner here has joined the list of other unsuccessful plaintiffs in this regard affords no basis for granting a writ of certiorari in this case.

Finally, not only is there is no ground for granting certiorari in this matter, but Petitioner also improperly misstates the nature of the case and requests the Court to consider employment discrimination claims which were never raised in the courts below and to do so on the basis of unfounded and unsupportable accusations of conspiracy and "evidence" which is nowhere to be found in the record in this case. Respondent respectfully submits that no useful or valid purpose would be served by such an exercise.

CONCLUSION

For the foregoing reasons, Respondent Norfolk Southern Corporation respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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